

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

FENDER MUSICAL INSTRUMENTS	)	
CORPORATION	)	
	)	
Plaintiff,	)	
	)	3:13-CV-01075
vs.	)	Nashville, TN
	)	
KELTON SWADE AND KELTON	)	
SWADE, LLC.,	)	
	)	
Defendants.	)	

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TRANSCRIPT OF SHOW CAUSE HEARING  
BEFORE THE HONORABLE KEVIN H. SHARP,  
UNITED STATES CHIEF DISTRICT JUDGE KEVIN H. SHARP  
FEBRUARY 9, 2017

APPEARANCES:

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INDEXINDEX OF EXHIBITS

<u>EXHIBIT NO:</u>	<u>DESCRIPTION:</u>	<u>ADMITTED:</u>
Defendant's 1,2	headstocks	13

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1           The above-styled cause came on to be heard on February 9,  
2 2017, at 2:42 p.m., before the Honorable Kevin H. Sharp, when  
3 the following proceedings were had, to-wit:

4           COURTROOM DEPUTY: All rise, please.

5           THE COURT: Thanks. Y'all can be seated.

6           All right. Before we get started, let me say this:  
7 Several years ago I had an IP infringement case, and it  
8 involved a game like Guitar Hero and, as part of that process,  
9 I got the game, so did y'all bring me anything? [Laughter.]  
10 Any guitars? Oh, great. Well, that's useful.

11           Okay. Well, then, I guess we've got to hear this  
12 case. Yes, sir? You're ready?

13           MR. DAVIS: Your Honor, with the Court's permission,  
14 I'd like to address an evidentiary matter on behalf of both  
15 parties.

16           THE COURT: Okay.

17           MR. DAVIS: Both parties have come today with some  
18 additional exhibits they would appreciate the Court  
19 considering. We have discussed those before the hearing began.  
20 The plaintiff has no objection to the defendant's proposed new  
21 exhibits. Of the plaintiff's proposed new exhibits, we have  
22 agreed not to rely upon one. The defendants have agreed not to  
23 object to two of them. We do have a final exhibit that we  
24 anticipate proffering on behalf of the plaintiff that the  
25 defendants may have some objections to.

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1 THE COURT: Okay. All right. Well, let's just wait.  
2 When do you anticipate doing that? What -- what is your  
3 exhibit that they've got problems with?

4 MR. DAVIS: It is a photograph or a screen shot that  
5 we've taken from the defendant's website as of this morning.

6 THE COURT: Okay. What's your objection to that?

7 MR. CARREON: Our concern is that, based upon prior  
8 communications between Mr. Swade and Mr. Van Vleet of Fender  
9 that he understood that that was okay. So my objection is  
10 simply going to be by way of cross-examination.

11 THE COURT: Well, which part of it was okay?

12 MR. CARREON: I beg your pardon?

13 THE COURT: What do you mean it was okay? What --

14 MR. CARREON: That they had communications about it,  
15 and this particular photograph was discussed by Mr. Swade. And  
16 Mr. Van Vleet gave his approval for the use of it in that  
17 fashion. It's like a historic photograph of the gentleman who  
18 was a friend of Elvis Presley's, and he's holding a guitar.  
19 It's quite an old photograph, and I believe that it -- it  
20 predates any disputes in this matter, and there were  
21 conversations about it, so...

22 THE COURT: Well, does that -- does that make it  
23 inadmissible, or is it just an explanation as to --

24 MR. CARREON: Exactly, Your Honor. The --

25 THE COURT: The weight of it does not --

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1 MR. CARREON: -- weight of it does not make it  
2 inadmissible. It makes Mr. Van Vleet subject to examination  
3 about that.

4 THE COURT: Yeah. I don't think it's inadmissible. I  
5 think -- right? If that's true, then the weight of it --

6 MR. CARREON: I agree, Your Honor.

7 MR. DAVIS: Your Honor, if I might approach the bench  
8 and hand it over, it might -- this dialogue might make more  
9 sense to the Court.

10 THE COURT: Yeah. No, I think I've got it, but that's  
11 okay.

12 Let's go ahead and get started. Have you got  
13 witnesses you want to put on? Anybody got a witness? No?

14 MR. DAVIS: We do not.

15 THE COURT: Okay. Then let's -- I'll just -- I'll  
16 hear you. We'll start with plaintiff.

17 MR. DAVIS: Thank you, Your Honor.

18 I will try not to recapitulate in -- in great detail  
19 what we have in our moving papers. But, Your Honor, formal  
20 litigation between the parties has been going on for three  
21 years now, and the parties' actual dispute has been pending for  
22 longer than that. And the terrible thing is that, for most of  
23 that time, this case would have simply gone away and this  
24 proceeding would have gone away, had Mr. Swade agreed to stop  
25 imitating Fender's federally registered trademarks. But his

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1 agreement to do so came only in October 2014 and was  
2 memorialized in a settlement agreement between the parties and,  
3 more importantly, in this Court's November 12th, 2014 final  
4 injunction and -- final judgment and permanent injunction.  
5 Since then, Mr. Swade's compliance with the Court's order has  
6 been glacial at best. Although he's made some changes, most of  
7 them have come only after Fender has called violations to his  
8 attention and had to invest the time and the resources into  
9 doing so.

10           And now, at the end of the day, Mr. Swade has become  
11 unresponsive to Fender's attempts to resolve the parties'  
12 remaining differences without the need to involve the Court.  
13 In particular, Mr. Swade has ignored his obligations under  
14 paragraph 7 -- 2C of this Court's order to avoid using guitar  
15 headstocks that are, quote, "in any way similar to those of  
16 Fender."

17           And so, Your Honor, this is not a proceeding in which  
18 there should be a -- a complete re-examination of the  
19 infringement inquiry or the likelihood of confusion between the  
20 parties' products, and the Sixth Circuit has made that very  
21 clear in its opinion in *Innovation Ventures*. That's not what's  
22 at stake. What's at stake is whether the defendants have  
23 complied with the Court's injunction. Fender's moving papers  
24 have laid out Mr. Swade's violations in detail, but there are  
25 several that merit particular attention. And the first is I'd

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1 like to refer to the sign boards over here, and may have to  
2 move these closer to the microphone.

3 THE COURT: That's all right. How about put them over  
4 here so that defense counsel can see them as well. Just in  
5 front of the jury box would be all right.

6 MR. DAVIS: And, Your Honor, what -- what we have on  
7 the sign board are exemplars of Fender's federally registered  
8 headstock designs. This is the material on the top. The  
9 bottom row here are materials that are provided by the  
10 defendants themselves. In other words, there should be no  
11 question as to the authenticity or accuracy of these graphics.  
12 Prior to the injunction being entered by the Court, the  
13 defendants were using these headstocks, which corresponded to  
14 Fender's designs. The very bottom row here are examples of the  
15 defendant's post injunction headstocks. And the inquiry,  
16 again, according to the -- to the Court's order is: Are these  
17 headstocks in any way similar to those of Fender? And Fender  
18 respectfully submits there could be no material dispute that  
19 that is the case.

20 Second, we have a screen shot from the -- the  
21 defendant's own website. And, once again, the Court can see  
22 here another example of the use of a headstock that cannot be  
23 considered not, in any way, similar to Fender's federally  
24 registered Telecaster headstock.

25 Then, Your Honor, on Page 14 of our brief, the Court

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1 will see that Mr. Swade has posted a video on his YouTube  
2 channel that clearly features a guitar with a headstock that  
3 also is indistinguishable from that of Fender. And then, Your  
4 Honor, we -- we have the -- the exhibits about which we have  
5 just spoken and, with the Court's permission, I'd like to  
6 approach the bench.

7 THE COURT: Okay.

8 MR. DAVIS: And defense counsel already has a copy of  
9 these.

10 And, Your Honor, there are four graphics as part of  
11 this exhibit, which we -- we have marked Plaintiff's Exhibit  
12 Number 100. The first two, the parties have agreed so that the  
13 Court can consider. These are Facebook screenshots taken from  
14 Mr. Swade's Facebook page as of this morning that clearly show  
15 the use of guitar headstocks that are quite similar to those of  
16 Fender. Indeed, they're perfectly indistinguishable from those  
17 of Fender. And on the second page, Your Honor, we have two  
18 additional graphics. The one on the top is the one the  
19 plaintiffs have agreed -- Fender has agreed not to rely upon in  
20 this proceeding. And the fourth one is the one as to which  
21 there may be some dispute. But that fourth graphic, again,  
22 shows Mr. Swade's use in the promotional context of a Fender  
23 headstock. This appears to be a Fender headstock that is  
24 identical -- I mean, and -- and a headstock that was identical  
25 to Fender's registered headstock to which no changes have been

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1 made. And Your Honor can see that this was posted on June  
2 29th, 2016, well after this Court's injunction.

3 For a finding of contempt, there are only three  
4 requirements. First, there must be clear and convincing  
5 evidence of a violation, and Fender respectfully submits it has  
6 provided just that, not only in the examples that we've called  
7 to the Court's attention today, but also throughout Fender's  
8 moving papers.

9 Second, contempt is appropriate because there is no  
10 evidence that the defendant took all reasonable steps to  
11 comply. What we've highlighted here today is all within the  
12 defendant's control.

13 And then finally, Your Honor, there is no evidence  
14 before the Court, there's no suggestion that the defendants  
15 here cannot comply fully with the injunction at this time.  
16 Again, all of this is within their control.

17 There are two other things that are worth pointing out  
18 under Sixth Circuit law. The first is that enjoined infringers  
19 must keep a safe distance from the plaintiff's mark. This is a  
20 higher obligation than might otherwise be the case if we were  
21 starting from scratch here. And the second thing is that  
22 Mr. Swade's good faith is also irrelevant under Sixth Circuit  
23 law. We have asked for a -- a series of remedies. Each one of  
24 these is contemplated by the Court's order. We would like  
25 statutory damages of the amount agreed upon by the parties and

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1 ordered by the Court, agreed upon in the parties' settlement  
2 agreement. That agreement is confidential and we; therefore,  
3 have not put it into the record, but we would like to, and if  
4 the Court grants our request for statutory damages, we will do  
5 so. We requested award for Fender attorneys' fees, which is  
6 expressly provided for by the Court's order and, additionally,  
7 the settlement agreement, and we would like revision of the  
8 Court's order to enjoin Mr. Swade's current designs, and this  
9 is a remedy expressly contemplated and approved by the Sixth  
10 Circuit's opinion last summer in *LFP IP v. Hustler Cincinnati*.  
11 On that issue, Mr. Swade relies upon Ninth Circuit authority,  
12 rather than the controlling and sole authority of this circuit,  
13 and he does so in a case styled as *Transia v. Ajak*, in which it  
14 was the defendants, the infringing defendants that sought  
15 modification of the -- of the permanent injunction. And so  
16 that -- that opinion is completely inapposite here. And in  
17 short, Your Honor, there is nothing to prevent this Court from  
18 looking at the express terms of the agreement, from looking at  
19 the exhibits, the numerous exhibits we have put into evidence  
20 and determining that the defendants are not in compliance with  
21 their obligations under the agreement. They have had plenty of  
22 warning, plenty of time to comply, and the record clearly  
23 reflects that not only did the parties engage in extensive  
24 correspondence before this motion was filed, but that Fender  
25 shared its moving papers with the defendants months in advance

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1 of filing them. The motion was not a surprise, and a finding  
2 of contempt should not be a surprise either to the defendants.

3 Thank you, Your Honor.

4 THE COURT: All right. Thank you.

5 MR. CARREON: Good morning. Good afternoon, Your  
6 Honor.

7 THE COURT: Good afternoon.

8 MR. CARREON: Charles Carreon for Mr. Swade.

9 The -- this Court decided a case on -- the written  
10 decision came down on December 22nd, 2016. That's the Sony  
11 ATV case, which has provided some additional guidance to me in  
12 formulating this argument.

13 I think that the burden that Fender has to carry here  
14 is that of showing, by clear and convincing evidence, that Mr.  
15 Swade is not in compliance with the agreed final injunction  
16 that was entered on November 13th, 2014 by Your Honor.

17 First off, I think looking at the standard by which  
18 the Court will consider that level of compliance, and I would  
19 like to move -- present a stipulation for the introduction of  
20 physical models --

21 THE COURT: Okay.

22 MR. CARREON: -- of what are currently being used by  
23 Mr. Swade, excuse me, in production. And these are the ones  
24 that I'm -- I'm going to mark right now and if I may? This,  
25 Your Honor, I would mark and move to be marked as Defendant's

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1 Exhibit Number 1.

2 THE COURT: Okay.

3 MR. CARREON: And this I would move to be marked as  
4 Exhibit Number 2.

5 THE COURT: Okay. Those are admitted.

6 [Defendant's Exhibit Nos. 1 and 2 admitted into evidence.]

7 THE COURT: Now, for the record, describe which is 1  
8 and which is 2.

9 MR. CARREON: Yes, Your Honor, I'll do that.

10 Exhibit Number 1, Your Honor, is a licensed stock,  
11 headstock made by a company called Allparts, and it is in all  
12 respects exactly what Fender uses on its own Telecaster guitar.  
13 So this will be marked as Defendant's Exhibit Number 1. And if  
14 I may, I will place that on the back of the neck.

15 Exhibit Number 2 is what is called the Kelton Swade  
16 AVRS, which has been marked here. And for a discussion of  
17 this -- the comparison between these two, the declaration of  
18 Rex Larson was submitted, and Paragraph 9 articulates the  
19 various distinctions that exist between these two headstocks.

20 Now, to clarify and make a comparison with the  
21 illustrative exhibit that was submitted by Fender, there is a  
22 distinction between the physical exhibit that we're presenting  
23 here at number two, the AVRS, and this one here that is at the  
24 bottom left of the exhibit that Fender has blown up. And I'll  
25 point that distinction out. What we have here is the -- I

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1 would call the bulb, what Mr. Larson refers to as --

2 THE COURT: No, I get it. And if this was -- if we  
3 were at a different part of this case, that would be a great  
4 argument. But aren't we talking about now whether or not  
5 they're in any way similar? Or, no, are you saying that is not  
6 the standard that we look at?

7 MR. CARREON: Exactly, Your Honor.

8 THE COURT: Well, that was an either/or. Which one?

9 MR. CARREON: The safe distance rule should not apply  
10 here. The safe distance rule we have the -- some authority  
11 from the Sixth Circuit that says that the safe distance rule is  
12 not to be applied against -- against persons who are enjoined  
13 pursuant to stipulation but, rather, against persons who have  
14 been convicted of infringement.

15 I cited in -- I -- in the opposition papers, I simply  
16 discussed the cases in which the safe distance rule had been  
17 applied. I did not note for the Court, and if I could now,  
18 note for the Court a couple of cases --

19 THE COURT: Okay.

20 MR. CARREON: -- that are relevant precedents in which  
21 the Court declined to apply the safe distance rule. And those  
22 are *Broderick*, 41 F.2d I have at 354, Your Honor. I'll have  
23 to give you the complete cite.

24 THE COURT: That's all right. I can find it.

25 MR. CARREON: Thank you, Your Honor.

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1 THE COURT: Okay.

2 MR. CARREON: And also *Tamko Roofing Products*, that's  
3 T-A-M-K-O, at 282 F.3d at 30. And my parenthetical here says  
4 applying safe distance rule only after defendant had been found  
5 in conjunction [sic] in contempt of an injunction.

6 And these were recently cited in -- relatively  
7 recently by the Sixth Circuit in *The Taubman Company*  
8 T-A-U-B-M-A-N vs. *Webfeats*, W-E-B-F-E-A-T-S, 319 F.3rd 770,  
9 jump cite 780 to 781, and that is Sixth Circuit, 2003. So I  
10 don't think it's too late to be submitting these --

11 THE COURT: No, that's all right.

12 MR. CARREON: -- by Mr. Larson, primarily because all  
13 they do is guide the Court to take a look at what is there.  
14 And there is no dispute that the Court has authority to simply  
15 make a visual comparison and based on its own lay opinion, to  
16 determine whether Mr. Swade has, in fact, done everything that  
17 is necessary, reasonably necessary to comply with the  
18 injunctions.

19 THE COURT: But what -- in order to comply, it cannot  
20 be in any way similar; right?

21 MR. CARREON: I -- I don't -- well, actually, that  
22 could mislead the Court if we don't take account of what  
23 Mr. Larson has said in Paragraph 10. And that -- and I, myself  
24 was mislead in that, not being a guitar expert in any way. And  
25 that is that one major characteristic of both of these Fender

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1 headstocks is the flat line and the --

2 THE COURT: Wait. What do you mean --

3 MR. CARREON: -- arrangement of the peg holes.

4 THE COURT: -- the Fender headstock? You mean the  
5 Swade and the Fender headstock? What do you mean? What Fender  
6 headstock? Are you talking about the Stratocaster or the  
7 Telecaster?

8 MR. CARREON: Both of the Fender headstocks --

9 THE COURT: Okay.

10 MR. CARREON: -- have this characteristic. And this  
11 was -- this was a nice innovation for guitarists because it  
12 enabled them to not reach above and below. All the tuners move  
13 in the same direction. It's nifty. It's been adopted, and it  
14 is generic, as Mr. Larson points out and as was not disputed in  
15 the reply papers.

16 MR. DAVIS: Your -- Your Honor, I'm sorry to  
17 interrupt.

18 THE COURT: Hang on.

19 MR. DAVIS: Just for the record, the plaintiff does  
20 have an objection to the consideration of Mr. Larson's  
21 testimony.

22 THE COURT: Well, I'm -- I'm going to -- I'm going to  
23 let it in. I'm not sure how useful it is because, first, it  
24 was you can just look at it and tell; it's a lay opinion. And  
25 then it was, well, wait a minute, you need an expert to really

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1 determine it. Why can't I just look at it and say is this in  
2 any way similar? But I'm still a little bit confused. Is that  
3 the standard we're looking at?

4 MR. CARREON: The --

5 THE COURT: And, if not, why not?

6 MR. CARREON: Well, I think the standard is discretion  
7 and --

8 THE COURT: No, I know. That's my standard. But --  
9 but in order -- what's -- the language in the consent judgment  
10 says: Can't do -- have anything that's in any way similar --

11 MR. CARREON: Well --

12 THE COURT: -- right? Or am I wrong?

13 MR. CARREON: Allow me to -- to pull up my copy of  
14 that, Your Honor and I -- I had taken a close look at the  
15 language of the decree, and what I saw is that we have pictures  
16 of the headstocks, and then in Paragraph Sub-C, 2 Sub-C we have  
17 the most -- the broadest language, and I'll just paraphrase it,  
18 shall completely cease using any identifying characteristic  
19 likely to dilute the distinctiveness of the trademarks or  
20 identifying characteristics of Fender.

21 And what I am saying is with respect to the peg holes,  
22 is that that is -- that cannot be considered an identifying  
23 characteristic of Fender, and the Court might not know that,  
24 unless that information were passed along through a witness  
25 like Mr. Larson. And I think that it is incumbent upon the

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1 Court, with a wise exercise of discretion, to not disregard  
2 that information. So I'm not saying that the Court must bend  
3 as it might be required to in a case where it was presented  
4 with an undisputed expert opinion, which is clearly the case  
5 here. I don't think you're required to do that. However, I do  
6 think that in the Court's wise exercise of its discretion, it  
7 will take into consideration Mr. Larson's observation and,  
8 particularly, that I think that a very substantial design  
9 element is, in fact, the straight-line peg holes, the straight  
10 line at the top. And I simply do not -- and what Mr. Larson  
11 further says in both Paragraphs 8 and 9 is that there is a  
12 limit to what one can do to a guitar head stock if you are  
13 going to go ahead and start with that generic I've got the peg  
14 holes across the top design. At that point, you've only got  
15 the bottom left to work with, and it can be made substantially  
16 distinctive.

17 And so, with that, I think that -- well, my -- what my  
18 argument is simply, that this is not the Kelton Swade AVRT head  
19 stock marked as Exhibit 2, cannot dilute the distinctiveness of  
20 the Fender head stock Number 1. It is distinctive and, to make  
21 it clear, this is the current in-production model. There is  
22 evidence in the record that after the decree was entered, that  
23 Mr. Swade used the design that is here. However, as Your Honor  
24 said very succinctly in the *Sony* matter, the purpose of this  
25 hearing is not so much to punish, but as to guide, with a bit

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1 of stick, the contemnar, if he is found to be in contempt, to  
2 guide him to compliance with the injunction. And -- so, for  
3 that reason, I think to inform the record completely, the --  
4 these observations from Mr. Larson's declaration are highly  
5 appropriate for the Court to consider. And I went directly to  
6 the dilution language, because I -- I believe that is -- that  
7 is -- that is the broadest language in the decree that Fender  
8 can cite in its favor here.

9           And I think that if we look at where we are currently  
10 and prospectively, we will see that, moving down to  
11 subparagraph 2E, the last -- I just highlighted here that:  
12 "Defendants, after the entry of this consent judgment, shall  
13 have a unique head stock design that is neither identical to,  
14 nor will create a likelihood of confusion with any head stock  
15 design owned by Fender."

16           And I will also point out that when Mr. Davis says  
17 that Mr. Swade was acting at a glacial pace, I think that it is  
18 worth taking note of the fact that I was completely unaware  
19 that Mr. Van Vleet was having what I would think is appropriate  
20 to characterize as ex parte communications with an adverse  
21 litigant without my knowledge and permission.

22           THE COURT: Well, is he a lawyer?

23           MR. CARREON: I beg your pardon?

24           THE COURT: I thought it was a -- you're a rep for  
25 Fender? You're -- are you counsel for Fender?

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1 MR. VAN VLEET: Yes, I am.

2 THE COURT: Okay.

3 MR. VAN VLEET: I am in-house counsel for Fender, yes.

4 THE COURT: Okay, sorry.

5 MR. CARREON: Yes, he is an attorney.

6 THE COURT: Okay. I thought you were an officer.

7 MR. CARREON: And not only that, but, as it happens,  
8 during all of this time, I was living in Tucson, Arizona.  
9 Mr. Van Vleet's office is in Scottsdale, Arizona. And on one  
10 occasion, we visited together. I drove up to Scottsdale. I  
11 met with him at Fender offices. We had a collegial  
12 relationship. And I am not casting dispersions in his  
13 direction. I understand that he was acting in good faith,  
14 however, Mr. Swade was trying to conserve on attorney's fees,  
15 he never told me about it, Mr. Van Vleet did not ask my  
16 permission, and things would not have proceeded at the pace  
17 they did if Mr. Van Vleet had said, you know, I'm talking with  
18 your client, I'm seeing what's going on. I really think we  
19 need more change faster, Charles. That would have had a very  
20 significant effect on accelerating the pace of these changes,  
21 but we do now have them. And what I am arguing to the Court is  
22 that since this is about gaining compliance with -- by a  
23 gentleman who I personally know and I think the record  
24 establishes, including the e-mails to which I've objected on  
25 the grounds that there are settlement discussions and -- and ex

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1 parte communications, but even those, when I see them, I see a  
2 mitigating factor of good faith, a gentleman who is trying very  
3 hard, who is tendering explanation after explanation and is, in  
4 fact, moving.

5           And I will now introduce into the record what I would  
6 like to mark as Exhibits 3 and 4. And I'll describe for the  
7 record Exhibit 3 as a Fender Stratocaster head stock. It  
8 actually has a slightly historic prominence. It is marked John  
9 Cruz, who is a well-known electric guitar luthier who works for  
10 the Fender Custom Shop, and this was recently removed from an  
11 electric guitar played by the lead guitarist of Aerosmith, who  
12 allowed Mr. Swade to keep it.

13           And this I'm going to mark as Exhibit 3. This is the  
14 classic Stratocaster design that has now been completely  
15 abandoned by Mr. Swade, and his Aviarist guitars now have a  
16 head stock that looks like Exhibit 4. And Exhibit 4 is  
17 described by Mr. Larson in declaration -- Paragraph 8. And he  
18 describes the various distinctions that are, to my eye, readily  
19 distinguishable. He describes this as the Kelton Swade AVRS,  
20 Exhibit 4, as a -- sort of a art deco -- excuse me, art  
21 Nouveau-style design. He marks a distinction between what he  
22 calls the naive bulb on the Stratocaster with the soft,  
23 delicate sort of teardrop that appears on the Swade AVRS. He  
24 notes that we have a concave curve here. The two concave  
25 curves intersect on the AVRS Exhibit 4 head stock, where as we

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1 have contrasting curves, a concave, and a convex, the entire --  
2 the size -- overlaying them, we can see that the size is  
3 substantially different. And there is -- I think that as  
4 between these two, there can be no way that there would be a  
5 mistake made by anyone, even a naive consumer, and it -- the  
6 Exhibit 4 head stock does not dilute, in any way, or create a  
7 likelihood of confusion that someone will purchase an AVRS  
8 thinking that it is, in fact, a Stratocaster.

9           So the -- if we look at all of the facts, what we have  
10 is a defendant who was operating somewhat in the dark and -- in  
11 the sense that he thought he was working collaboratively almost  
12 with Mr. Van Vleet as his partner to try and achieve  
13 compliance. I don't think that he was necessarily moving with  
14 the kind of alacrity that Fender might have desired and,  
15 frankly, had I been Fender's trademark counsel, and I've done  
16 similar cases, I would have wanted it to move along more  
17 quickly. However, none of that is where we are. The -- the  
18 lack of urgency is demonstrated by the fact that Fender has  
19 demonstrated no lost sales, no actual injury whatsoever, and  
20 has taken a very leisurely pace toward moving through the Court  
21 with its dispute. Also, it never bothered to contact me at any  
22 time before actually sending Mr. Swade the proposed moving  
23 papers for this motion. It was at that point that Mr. Swade  
24 realized that things had not gone well and --

25           THE COURT: Okay. Maybe I misunderstood. The papers

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1 were sent to your client, not to you?

2 MR. CARREON: That is correct, Your Honor. Of course,  
3 I received them through ECF service when they were served.

4 THE COURT: Right.

5 MR. CARREON: And when Mr. Swade got them, he sent  
6 them along to me. And at that point I started communicating  
7 with Mr. Van Vleet, and I didn't rise to the heights about the  
8 issue of the ex parte communications because, as I said, I -- I  
9 credited him with good faith in the matter. However,  
10 causationally, in terms of what happened, he would have gotten  
11 a lot faster relief if he had called me, because I have  
12 considerably more persuasive ability when it comes to Mr. Swade  
13 since I can send him a bill for my advice, and that seems to  
14 help people comprehend.

15 THE COURT: Well, there are a lot of reasons that you  
16 should have been contacted instead of him.

17 MR. CARREON: So the -- the Larson declaration, just  
18 to summarize, shows that there has been good effort at  
19 compliance, and especially the current level of compliance  
20 brings us within the scope of the consent decree. Those are  
21 Paragraphs 7 and 8, Paragraph 9, and the generic nature of the  
22 peg hole alignment, which prevents the Court from erring by  
23 considering elements that are not distinctively Fender as being  
24 distinctively Fender.

25 The next thing that I wanted to address was moving on

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1 towards the issue of the possibility of a sanction, which I  
2 think is -- while I, in no way, want to suggest that a  
3 sanction --

4 THE COURT: Well, you don't have to go through that,  
5 because that is -- that is not going to happen with this  
6 hearing. What will happen with this hearing is that I will set  
7 another hearing, and I want to hear some witnesses and decide  
8 those issues, whether it's hearing from your client or --

9 MR. CARREON: Excellent, Your Honor. That's  
10 exactly as --

11 THE COURT: I won't sanction anybody without getting a  
12 witness on the stand and hearing these things that you are  
13 arguing.

14 MR. CARREON: I may have to apologize in advance for  
15 not being able to attend that hearing, and I'll have Local  
16 Counsel Everett do it. I have a long schedule of vacation that  
17 starts on the 22nd that takes me to Mexico.

18 THE COURT: How long are you going to be gone?

19 MR. CARREON: Three months.

20 THE COURT: All right. Okay.

21 MR. CARREON: Yes. However, I understand, so I -- I  
22 won't address that, except I will address the evidentiary  
23 factor, which is a couple of things. One is that the screen  
24 shots from the third-party web sites do not establish that  
25 Kelton Swade has continued to market the older preinjunction

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1 designs. And Mr. Larson's declaration sets that forth with  
2 third-party evidence which, again, I don't think it's expert  
3 evidence. It is simply there at Paragraph 10. He states that  
4 he's reviewed, and he enumerates the Exhibits C through T and  
5 V. They were not authored by Kelton Swade, and Mr. Swade does  
6 not have control, and was not -- did not agree to attempt to  
7 exercise control over third-party sales in the secondary market  
8 of his guitars, which as he -- sometimes people believe that  
9 they have a new Kelton Swade guitar, but they've been relicked  
10 to look old. These guitars just look old. So people may think  
11 that they're selling them, may even advertise them as new  
12 because they think it will get more money, but some of these  
13 guitars have been around for quite some time and long before  
14 any decree was entered. And so Mr. Swade has no power over  
15 those. The -- and I do not think that -- that they can be  
16 counted up and said that each one is a violation because none  
17 of them has been established by any reliable evidence to be on  
18 the Internet due to Mr. Swade, nor that he would get any  
19 revenue from that at all.

20           So if the Court concludes that Mr. Swade has -- did  
21 not immediately make sufficient changes to comply with the  
22 order, but that he did so prior to the hearing, the Court  
23 should not find him in contempt. There might be some relief  
24 available to the defendants for the cost of proceeding, and  
25 that would be something that the Court would consider.

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1 However, there is plenty of authority that says that if no harm  
2 is showed, that attorneys' fees should not be awarded.

3           The basis for assessing the -- any sanction would have  
4 to be based upon admissible evidence and, at this point, I see  
5 none. The defendant has presented evidence that he is in  
6 compliance. He is not contumacious. He has never been  
7 adjudicated an infringer; rather, he agreed to alter his head  
8 stock designs. He didn't do so as quickly or as to the same  
9 degree of -- of change as Fender desired. But where we stand  
10 right now is that consumers are at no risk of being confused,  
11 and Fender is at no risk of having its trademarks diluted.

12           THE COURT: Okay. All right. Thank you.

13           MR. CARREON: Thank you, Your Honor.

14           THE COURT: Tell me, Mr. Davis, where -- where is the  
15 harm? Do you all have any? Not that it makes a difference on  
16 whether or not he's violating this order, but is there any harm  
17 that -- that Fender can point to?

18           MR. DAVIS: Your Honor, the nature of a trademark  
19 right is it identifies the exclusive source.

20           THE COURT: I understand that, but I'm just asking if  
21 you've been able to identify any real harm?

22           MR. DAVIS: No, Your Honor. As far as monetary --

23           THE COURT: I'm not saying that you have to. I'm just  
24 saying --

25           MR. DAVIS: And --

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1           THE COURT: Or anyone who has been confused. Sorry to  
2 keep interrupting you. Can you identify anyone who's actually  
3 been confused?

4           MR. DAVIS: Not as to these particular examples, what  
5 has gone on since the injunction. But in terms of the harm --  
6 again, Your Honor, the trademark symbolizes the -- the -- a  
7 single source of the products bearing it. And if you have a  
8 number of -- if you have products coming from a number of  
9 different sources that bear the same trademark, the trademark  
10 itself is destroyed, it no longer exists, and that's the  
11 irreparable harm here.

12           THE COURT: Here -- here's my gut reaction. I look at  
13 what you're calling the -- the Stratocaster and from whatever  
14 distance, I look at that and go, that's not a Stratocaster,  
15 right? You can just look at it and tell. That's not true with  
16 the Telecaster. I could be confused by that if I'm looking  
17 from a distance and -- right, without an expert looking at  
18 those things and telling me, well, look at this thing and I go,  
19 yeah, yeah, yeah, I see that. But if I just look at it and I  
20 go, that looks like a Telecaster. There's no way I'm confused  
21 by the Stratocaster. You can look at that and just go that's  
22 not a Stratocaster.

23           MR. DAVIS: Now, with all due respect, Your Honor,  
24 that is not the standard we're talking with here.

25           THE COURT: Well, we are talking about is it in any

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1 way similar? And I'm looking at it and going, that's not  
2 similar in the most vague way. Here is what I'm saying. I'm  
3 going to set this for another hearing. I want to hear some  
4 witnesses on this but, man, this could have been resolved very  
5 easily with somebody working with the defendant and going, you  
6 know what? Okay. Maybe you're not happy with the  
7 Stratocaster. Work with him and make some changes, and I'm not  
8 really happy with the Telecaster. Make some more changes to  
9 that, and then y'all wouldn't be standing here.

10 MR. DAVIS: And you're right.

11 THE COURT: This doesn't make any sense.

12 MR. DAVIS: Your Honor --

13 THE COURT: Are you willing to do that?

14 MR. SWADE: Absolutely.

15 THE COURT: Just work with them and make some changes.

16 MR. CARREON: I really tried.

17 THE COURT: Well, you're willing to -- set aside  
18 what's happened in the past. Go do that. I'm going to set  
19 this for a hearing on the -- on the contempt issue. I think  
20 there's enough here that it's worthy of another hearing, but in  
21 the meantime, you can all figure this out. You don't need a  
22 Court holding you in contempt to say you can do better because  
23 you can do better. Now, I think this probably would have been  
24 resolved a lot easier had somebody -- or sooner, had somebody  
25 made a call to the lawyer, not the --

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1           MR. DAVIS: Your Honor, if I could address that. I  
2 think there have been some mischaracterizations here. The  
3 settlement agreement, which again is not in evidence, but if  
4 Your Honor wishes, we'll be willing to submit it under seal,  
5 requires Fender to contact Mr. Swade, not Mr. Carreon. And  
6 it's also true that during a long period, almost a year's worth  
7 of negotiations between the parties, Mr. Swade identified  
8 another lawyer, not Mr. Carreon, as representing him. So,  
9 therefore, the communications from Fender went to the lawyer  
10 that Mr. Swade specified, not to Mr. Carreon, for the simple  
11 reason that Mr. Carreon was no longer involved in the case.

12           THE COURT: Well, who is that lawyer, somebody here in  
13 town?

14           MR. DAVIS: Jessica Ponce is her name. If I might ask  
15 my colleagues where she's located?

16           THE COURT: It's not important at this point. The --  
17 and I'm not -- whether he can contact him, or should have  
18 contacted him, it's still a true statement that had someone  
19 talked to Mr. Carreon, that the lawyers talking to each other  
20 could have worked this out. The Telecaster is too close. The  
21 Stratocaster, you all work on it. I'm not confused. But, you  
22 know, I still think there's enough here that you are not in  
23 compliance with the consent order. Is it to the level that  
24 it's worthy of contempt? I don't know. We're going to have a  
25 hearing on that. If it gets resolved before then, then it's

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1 resolved, and everybody's happy and everybody quits spending  
2 money. And I'm sure Fender does well, but they don't like  
3 paying lawyers when they don't need to, right? I know  
4 Mr. Swade doesn't want to keep paying lawyers. It's  
5 unnecessary. Just make the changes, comply with this thing.  
6 But if you can't, we're going to have this hearing, and I'm  
7 going to decide whether or not you're in contempt, and then  
8 that -- that provides a whole other level of penalties for you  
9 for doing that. Let's just get some guitars on the market that  
10 don't confuse people and get back to what you all really do,  
11 which is making some music and not spending money on litigation  
12 filing paper. That wood could be used for better purposes than  
13 more paper. Make a guitar with it or something.

14 All right. So let's do this. I'm going to set this  
15 for a contempt hearing.

16 Now, some of you all may or may not be aware that if I  
17 set it out too far, I not going to be here to hear this, so I'm  
18 going to have -- I'm not going to give you a lot of time.  
19 Angie, what have we got in March? What about March 3rd,  
20 Friday, March 3rd. When do you leave town? This month?

21 MR. CARREON: I beg your pardon, Your Honor?

22 THE COURT: You're out this month?

23 MR. CARREON: I am.

24 THE COURT: You leave this month?

25 MR. CARREON: Yes, Your Honor, February 22nd. I'm not

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1 back until May 24th.

2 THE COURT: Well, I'm going to go March 3rd, and that  
3 gives everybody time to figure this thing out and, if not,  
4 we'll have a hearing on it.

5 MR. CARREON: 2:30, Your Honor?

6 THE COURT: No. Let's see. Angie, what will work for  
7 us? Is U.S. versus Frazier going away? Let's do that. Let's  
8 take the Frazier time. 2:00.

9 Do you know what this -- what's that morning hearing?  
10 We'll take the Frazier. 2:00, March 3rd, Friday, unless you  
11 all let me know that you've got this figured out, right?  
12 Mr. Swade, right? I said we are going to be here March 3rd,  
13 it's a Friday, at 2:00 in the afternoon, unless somebody tells  
14 me that you all have figured this out before hand.

15 MR. SWADE: Yes, sir.

16 MR. DAVIS: Your Honor, could I bother the Court with  
17 a few follow-up questions?

18 THE COURT: Yeah.

19 MR. DAVIS: It's my understanding, from the Court's  
20 earlier comments, that you would benefit from having live  
21 witnesses?

22 THE COURT: Yes.

23 MR. DAVIS: Is that correct?

24 THE COURT: Right, because one of the things is I want  
25 to hear from Mr. Swade.

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1 MR. DAVIS: Okay.

2 THE COURT: And, you know, I'd like to hear some --  
3 some expert testimony on -- on confusion and similarity, you  
4 know, some of these elements from the -- from the decree, the  
5 consent decree.

6 MR. DAVIS: Your Honor, if the Court is going to  
7 entertain Mr. Larson's testimony as that of an expert, will  
8 Fender have the opportunity to cross-examine him or depose him  
9 in advance?

10 THE COURT: Yeah. You can depose him if you want. If  
11 you need to, you can bring your own rebuttal if you want to,  
12 but give them enough notice. You know, you've got to give them  
13 enough notice if they want to depose your expert. I doubt it's  
14 necessary that anybody needs to depose an expert. But you do  
15 have to give a report, though. Then you can decide whether or  
16 not you want to depose his rebuttal expert based on his report.

17 MR. CARREON: If -- I was asked to correct the record  
18 with respect to who gave -- this is -- this was actually the  
19 Lynyrd Skynyrd guitarist.

20 THE COURT: All right.

21 MR. CARREON: And I just want to be clear. Did I  
22 understand the Court to say that the AVRS Exhibit 4 is okay?

23 THE COURT: No, I didn't go that far.

24 MR. CARREON: Not that far.

25 THE COURT: I said that I look at that and I know that

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1 is not a Stratocaster.

2 MR. CARREON: Okay.

3 THE COURT: Does that mean that it's not too similar?  
4 I -- you know, I don't know.

5 MR. CARREON: All right.

6 THE COURT: That's still hanging out there. All I'm  
7 saying is you hold those two up, and I know which one's the  
8 Stratocaster and which one is something else. I wouldn't know  
9 it's a Swade, but I would know it's something else. You hold  
10 up the other two and say pick out the Telecaster, you know, it  
11 would take me a second and go, ahhh, I think it's that one.  
12 That is as lay person as it gets, but -- right? That's who is  
13 out in the market. They're not all guitarists for Skynyrd, so  
14 that they know exactly what they're getting. A lot of these  
15 are out there. And, you know, if someone is just going into  
16 their local music store, they're not going to know. It looks  
17 pretty close. It may be.

18 MR. CARREON: I understand, Your Honor.

19 THE COURT: And if I'm one of those guys walking in,  
20 right? I would have to look at the head stock and go, wait a  
21 minute. That doesn't say Fender. What's this?

22 MR. CARREON: I understand.

23 THE COURT: The other one, I -- I don't need to look  
24 at. I know that's not Fender.

25 MR. DAVIS: In light of the Court's interest in the

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1 subject, Fender requests leave to supplement the record with  
2 respect to the extensive lawyer to lawyer communications that  
3 transpired in this case before Mr. Carreon's reengagement in  
4 the case. Because I'm concerned that the Court does not  
5 understand fully exactly what those consisted of and how  
6 extensive they were.

7 MR. CARREON: Well, your Honor, I've been, at all  
8 times, counsel of record. I've never subbed out. I've never  
9 stepped away.

10 THE COURT: Well, that's all right. It's -- it's not  
11 important for what Mr. Swade did or didn't do. I mean, you can  
12 if you want to bill Fender for it. But am I going to spend a  
13 lot of time reading it? Not much. So you can tell him whether  
14 or not you want to file more paper.

15 MR. DAVIS: And then, Your Honor, with the Court's  
16 permission, I think I would -- I'd like to flag one thing in  
17 the record that I think Mr. Carreon will agree with. I  
18 believe, that when referring to Defendant's Exhibit 2, he  
19 several times referred to it as Mr. Swade's AVRS model when, in  
20 fact, I think the proper reference is AVRT. Is that --

21 MR. CARREON: So stipulated. Thank you.

22 THE COURT: Yeah, yeah.

23 MR. CARREON: And, Your Honor, would you like us to  
24 keep these exhibits for the Court's convenience, or --

25 THE COURT: No, just keep them here. It will be

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1 easier. I'll just keep them as part of the file.

2 MR. CARREON: Okay. I will finish filling out the  
3 exhibit stickers.

4 THE COURT: All right. You all go figure this out,  
5 all right? You don't need me to figure this out for you.

6 Mr. Hayworth?

7 MR. HAYWORTH: Your Honor, may I ask one question?

8 THE COURT: Yes.

9 MR. HAYWORTH: I am not available on March 3rd, but I  
10 do have co-counsel there, Mr. Malone --

11 THE COURT: That's --

12 MR. HAYWORTH: -- from my office. I don't have his  
13 calendar.

14 But I did want to ask the Court, in light of the  
15 discussion of Fender spending money, if the Court would  
16 entertain a motion to waive the local counsel requirement.

17 THE COURT: No, no. If you all -- if you all don't  
18 have a substantive role in this, you don't need to be here.

19 MR. HAYWORTH: Thank you.

20 THE COURT: Okay. All right. Okay. Anything else  
21 you all want to talk about? Anybody? Anybody? Bueller? No?  
22 All right. We're done. Thanks.

23 COURTROOM DEPUTY: All rise, please.

24 [Proceedings concluded at 3:30 p.m.]

25

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## 1 REPORTER'S CERTIFICATE

2  
3 I, Traci D. Walker, Official Court Reporter for  
4 the United States District Court for the Middle District of  
5 Tennessee, with offices at Nashville, do hereby certify:

6 That I reported on the Stenograph machine the  
7 proceedings held in open court on February 9, 2017, in the  
8 matter of FENDER MUSICAL INSTRUMENTS CORPORATION VS. KELTON  
9 SWADE AND KELTON SWADE, LLC., Case Number: 3:13-CV-01075; that  
10 said proceedings in connection with the hearing were reduced to  
11 typewritten form by me; and that the foregoing transcript  
12 (Pages 1-35) is a true and accurate record of the proceedings.

13 This 16TH day of February, 2017.  
14  
15  
16

17 /s/ Traci D. Walker, RMR-CRR  
18 Official Court Reporter  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DISTRICT COURT